

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-219443

DATE: October 21, 1985

MATTER OF: T.L. James & Company, Incorporated

DIGEST:

1. Where evaluation method in invitation for bids is structured so as to encourage unbalanced bidding, the invitation is defective, per se, and no bid can be evaluated properly because there is insufficient assurance that award will result in the lowest ultimate cost to the government.
2. Specifications for level of harbor dredging in invitation for bids that do not adequately describe the government's actual needs provides a compelling reason for the agency's rejection of all bids and cancellation of the solicitation.
3. Provision of the Federal Acquisition Regulation, 48 C.F.R. § 14.404-1(a)(3), that requires separate procurement for increased requirements of items being procured instead of cancellation of solicitation does not apply where procurement is for maintenance dredging to assure navigability of harbor.

T.L. James & Company, Incorporated (James) protests the rejection of all bids and cancellation of invitation for bids (IFB) No. DACW21-85-B-0005, issued by the Savannah District, Army Corps of Engineers, for maintenance dredging of the Brunswick Harbor Entrance Channel and St. Simons Sound, Georgia.

After bid opening, the Corps rejected all bids and canceled the IFB on the basis that the solicitation provisions did not assure that the Brunswick Bar Channel would be dredged to a depth adequate for the safe passage of new deep-draft vessels scheduled to

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use the harbor. James, the apparent low bidder, asserts that deeper-draft vessels had not been recently scheduled to use the Brunswick harbor, and therefore disputes whether there exists a reason which should compel the cancellation of the solicitation after bids were opened. The protester maintains that award should be made to it. We deny the protest.

Because the Corps canceled the solicitation on the basis that the specifications were defective, that issue has been the focus of the parties' submissions to us. In reviewing the record of this procurement, however, we also note that the prices bid by James and the second low bidder were such that the third low bidder filed an agency-level protest on the basis that the lower bids were materially unbalanced. This issue was never resolved at the agency level, and was not the subject of a protest to our Office, because the solicitation was canceled on other grounds. Nevertheless, we think this aspect of the procurement, which factually is quite similar to another which was the subject of a recent decision by our Office, alone would warrant cancellation of the IFB.

Background

The bidding schedule in IFB 0005 required bidders to enter a lump sum price for mobilization and demobilization and prices per cubic yard for dredging an estimated 1,139,500 cubic yards of material from the Brunswick Bar Channel and 52,700 cubic yards from St. Simons Sound. Bidders were then to enter a "total bid"--the sum of these three items--which was the basis upon which bids were evaluated for award. The estimated quantity of 1,139,500 cubic yards for the Brunswick Bar Channel included 359,800 cubic yards of material which was required to be removed plus 779,700 cubic yards of allowable overdepth representing 70 percent of the available overdepth at that site. For St. Simons Sound, the 52,700 cubic yards consisted of 7,600 cubic yards of material required to be removed plus 45,100 cubic yards of allowable overdepth, representing 100 percent of the available overdepth at that site. (Overdepth is the additional amount of dredging allowed above the minimum required because the dredging operation is incapable of precise performance.)

The three bids received in response to the solicitation, and the government estimate, were as follows:

T. L. James & Company, Inc.

Mobilization & Demobilization		\$1,350,000
Brunswick Bar Channel	\$.40 c.y.	455,800
St. Simons Sound	\$.50 c.y.	26,350
		<u>\$1,832,150</u>

North American Trailing Co.

Mobilization & Demobilization		\$1,000,000
Brunswick Bar Channel	\$1.20 c.y.	1,367,400
St. Simons Sound	\$1.20 c.y.	63,240
		<u>\$2,430,640</u>

Stuyvesant Dredging Company

Mobilization & Demobilization		\$ 600,000
Brunswick Bar Channel	\$1.98 c.y.	2,256,210
St. Simons Sound	\$3.61 c.y.	190,247
		<u>\$3,046,457</u>

Government Estimate

Mobilization & Demobilization		\$ 284,760
Brunswick Bar Channel	\$2.37 c.y.	2,700,615
St. Simons Sound	\$3.06 c.y.	161,262
		<u>\$3,146,637</u>

After bid opening, Stuyvesant Dredging Company (SDC), the highest bidder, filed a protest with the Corps against award to either of the other two bidders on the basis that those bids should be rejected as materially unbalanced. SDC contended that the two lower bidders "front-loaded" the mobilization portion of their bids and, so that their bids would remain competitive, bid below cost unit rates for dredging the minimum cubic yards required plus all allowable overdepth. In its protest to the Corps, SDC maintained that the structure of the lower bids provided the firms who submitted them no incentive to dredge any more than the minimum amount required because "the smaller the quantity removed, the greater the extent to which their losses due to the low unit rates bid will be offset by the profit from their inflated mobilization bids." SDC also pointed out that the solicitation facilitated this approach in that it gave the contractor the option to remove some or all of the allowable amount of overdepth. Based on these postulations, SDC argued that if the bids were evaluated on

the more realistic basis of dredging only the minimum quantity required by the contract, SDC's bid represented the lowest cost to the government.

In connection with SDC's protest, the Corps reviewed the solicitation and the bids received and determined that there were compelling reasons to reject all bids and cancel the solicitation. That determination was based on the contracting officer's finding that:

1. the solicitation was inadequate in that it did not require removal of sufficient material to assure that the full project (harbor) depth is maintained at all times;
2. the solicitation should be modified to require one additional foot of advance maintenance dredging (instead of including this dredging as a part of the optional allowable overdepth); and
3. the IFB limitation that precludes payment to a contractor for all of the allowable over-depth material must be removed.

James protested the cancellation of the IFB to the Corps, contending that the Corps had cited no compelling reason therefor. In support of its position, James cited the Federal Procurement Regulations, § 1-2.404-1 and Armed Services Procurement Regulation (ASPR) § 2-404, both now superseded by a similar provision which appears in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-1 (1984). James further contended that the Corps' actions contravened the provisions of ASPR § 2.404.1(a); the current provision in the FAR, 48 C.F.R. § 14.404-1(a)(3), states that generally an IFB should not be canceled and readvertised "due solely to increased requirements for the items being acquired," but rather award should be made on the initial invitation for bids and the "additional quantity should be treated as a new acquisition."

The Corps denied James' protest on the grounds that the contracting officer had a reasonable basis for determining that the solicitation should be canceled because of inadequate specifications. The agency also determined that the provisions of FAR, 48 C.F.R. § 14.404-1(a)(3), were not applicable since the solicitation was not canceled due to "increased requirements," but because, as issued, the solicitation contained inadequate specifications that did

not reflect the government's actual immediate needs, *i.e.*, "to assure the navigability of Brunswick Harbor." The Corps further responded that it would not be in the best interest of the government to let two separate contracts to meet the government's needs for this project.

In its protest of the Corps' action to our Office, James challenges the reasons asserted by the Corps as the basis of its decision to cancel the solicitation. Specifically, James takes issue with the Corps' finding that, although its past practice has been to dredge the Brunswick Bar Channel to project depths as stated in the solicitation, ". . . [n]ew deeper-draft vessels now scheduled to use Brunswick Harbor require that the full project depth be maintained at all times."

According to the Corps, the result of this change in the use of the harbor is that a part (1 foot) of the dredging advertised in the solicitation as "optional allowable overdepth" must now be classified as "required advance maintenance dredging." The Corps explains that additional material must be "removed to allow sediment storage capacity below project depth . . . since dredging only to project depth would result in shoaling encroaching into the navigation channel" and consequently in inadequate channel dimensions.

James contends, however, that there has been no recent scheduling of new deeper-draft vessels into the Brunswick Harbor so as to require this change to the specifications.

Discussion

Clearly present in the record of this procurement is the question of whether two of the three bids received were materially unbalanced. The Corps did not address the merits of SDC's agency-level protest on this issue, considering it academic since the IFB was canceled for other reasons. In addition, neither in its protest of the cancellation to the agency nor its protest to our Office has James addressed SDC's allegation that James' bid was materially unbalanced. We note, however, that contemporaneously with this protest James filed another one against the rejection of its bid by the Charleston District, Army Corps of Engineers, as materially unbalanced in conjunction with another procurement of harbor dredging services. The solicitation format and evaluation scheme in the Charleston case are identical to that used here, and James' pricing structure and the relationship of its bid prices to those

contained in the other bid and in the government estimate are quite similar in both cases. In the Charleston case, James' bid was low only if 95 percent or more of the total amount available actually was dredged. If lesser amounts, consistent with the Corps' past experience at that site, were dredged, or if only the minimum amount required were dredged, James no longer would be the low bidder.

We held, with respect to the Charleston procurement, that the method of evaluation used encourage unbalanced bidding and therefore made the solicitation defective, per se: ". . . no bid can be properly evaluated because there is insufficient assurance that any award will result in the lowest cost to the government." We recommended to the Corps that it cancel the IFB and "resolicit its requirements on the basis of an evaluation method which reflects its best estimate of the actual work to be performed." T.L. James & Co., Inc., B-219444, Sept. 17, 1985, 64 Comp. Gen. 85-2 C.P.D. ¶ 194. We think the same observations apply to IFB 0005 and would have warranted its cancellation. Consequently, we would not object to the cancellation here in any event.

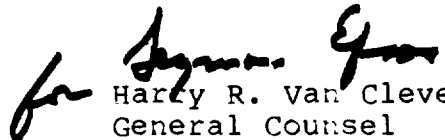
Concerning the protester's contentions regarding the Corps' cancellation of the solicitation, contracting officers have broad discretion to reject all bids and cancel a solicitation. However, because of the potentially adverse impact of such a decision upon the competitive bidding system, a cogent and compelling reason must support a decision to cancel. FAR, 48 C.F.R. § 14.404-1. Since we limit our review of the propriety of a cancellation to the question of whether the exercise of discretion was reasonable, the protester has the burden of showing that the contracting officer abused this discretion. Hoyer Construction Co., Inc., B-216825, Feb. 13, 1985, 85-1 C.P.D. ¶ 194; Pacific Scientific Co., Gardner-Neotec Division, B-208193, Jan. 18, 1983, 83-1 C.P.D. ¶ 61.

The incorporation of specifications in an IFB that do not adequately describe the government's actual needs generally constitutes a compelling reason for cancellation of the solicitation. FAR, 48 C.F.R. § 14.404-1(c)(1); Commercial Envelope Mfg. Co., Inc., B-213272, Feb. 12, 1984, 84-1 C.P.D. ¶ 206. It is primarily the contracting agency's responsibility to determine its minimum needs, and we will not question that determination in the absence of a clear showing that the determination was arbitrary or capricious. American Marine Decking Systems, Inc., B-216580, Mar. 1, 1985, 85-1 C.P.D. ¶ 256.

The contracting officer's stated reason for canceling the solicitation is that the specifications were inadequate because the IFB did not require the removal of sufficient material to assure the navigability of the channel. The protester, while challenging the basis for that reason, has not presented any evidence that the proposed revisions to the IFB are unnecessary to meet the government's minimum needs. We therefore are not inclined to question the agency's determination of its minimum needs.

Concerning James' contentions that the agency should have conducted a separate procurement for dredging the additional depth, we agree with the Corps that FAR, 48 C.F.R. § 14.404-1(a)(3) is not applicable in this case since the procurement was for maintenance services and not for a supply of contract items. See Garrison Construction Co., B-211359.2, Oct. 31, 1983, 83-2 C.P.D. ¶ 515.

The protest is denied.


for Harry R. Van Cleve
General Counsel